Supreme Court, U.S.
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No. 98-1449

IN THE

Supreme Court of the United States

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,
Petitioners,

v.

DENICE H. REIN, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Intervenor.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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This reply brief is submitted in response to the Respondents' Brief in Opposition, filed April 12, 1999 ("Resp. Br."), and the Brief for the United States, filed May 12, 1999 ("U.S. Br.").

I.

The 1996 Amendment to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(7)("1996 Amendment" or "§1605(a)(7)") that provides the jurisdictional basis for this suit declares in language admitting of no ambiguity that subject-matter jurisdiction will not lie under the Amendment —

> if the foreign state *was not designated as a state sponsor of terrorism* under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) *at the time the act occurred*, unless later so designated as a result of such act; . . .

§1605(a)(7)(A), emphasis added.[1]

We pointed out in the petition (Pet. at 7 n.4) that we were unable to locate a specific designation of Libya as a "state sponsor of terrorism" under either statute referred to in the 1996 Amendment or a publication of such designation in the Federal Register as mandated by both statutes. Respondents grudgingly concede that Libya has not been specifically designated as a "state sponsor of terrorism," as the 1996 Amendment mandates. (Br. Resp. at 5-6). Respondents and the Government, however, contend that Congress itself found Libya to be a "terrorist state" and that, therefore, the statutory prerequisite to the exercise of subject-matter jurisdiction in respect to Libya have been met. (Resp. Br. at 5-6, U.S. Br. at 8-9). The contention does not bear scrutiny.

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[1] Section 6(j) of the Export Administration Act of 1979 is reproduced in the petition (Pet. at 5).

The Congressional finding in the Antiterrorism and Effective Death Penalty Act of 1966[2] to which respondents point (Resp. Br. at 5), urged the President "to increase the international isolation of state sponsors of international terrorism" and to "oppose any future initiatives to ease sanctions on Libya".

The Congressional "Declaration of Policy" preceding the Iran and Libya Sanctions Act of 1996[3] stated that it is the policy of the United States to seek full compliance by Libya with certain U.N. Security Council resolutions, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction.

The Congressional findings and the declaration of policy fail to satisfy the requirement that there be an express, publicly announced determination by the Secretary of State in respect to Libya before subject-matter jurisdiction can be asserted by a federal court.

As final authority respondents point to a proposed revision of the Export Administration Regulations in 1982 by a Deputy Assistant Secretary for Export Administration, 47 Fed. Reg. 11247 (Br. Resp. at 5 n.1) stating that the "President has determined that foreign policy controls affecting exports to Libya should be expanded, and that Libya was being placed in "Country Group S," which would require validated licenses for all exports to Libya of technical data and for most commodities. The announcement contains no determination by the Secretary of State that Libya is a "state sponsor of terrorism" under The Export Administration Act of 1979.

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[2] Pub.L. 104-132 (Apr. 24, 1996), 110 Stat. 1214, 1255.

[3] Pub.L. 104-172 (Aug. 5, 1996), Sec. 3, 110 Stat. 1541.

It is plain that neither the Congressional findings, its declaration of policy, nor Libya's placement in "Country Group S" by the Department of Commerce for export control purposes meets the statutory mandate that Libya "be designated as a state sponsor of terrorism" under the Export Administration Act of 1979 or the Foreign Assistance Act of 1961. §1605(a)(7)(A) could not be clearer that only a specific designation of Libya under either Act as a "state sponsor of terrorism" would vest statutory subject-matter jurisdiction in a suit against Libya under the 1996 Amendment. The statute commands that absent such designation "the court *shall decline to hear a claim* under [§1605(a)(7)]" (emphasis added). This Court has announced the governing principle thus: "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984).

The Government, further claims that "the Legislative history suggests that Section 1605(a)(7) was intended at least in part to subject Libya and its agencies and instrumentalities to civil liability for the bombing of Pan Am Flight 103." (U.S. Br. at 4 n.2). The "legislative history" that it cites consists of two letters from constituents and remarks of three members of Congress inserted in the Congressional Records. (U.S. Br. at 4 n.2). Libya is not mentioned in any of the committee reports on the Antiterrorism and Effective Death Penalty Act of 1996.[4]

Elsewhere, the Government boldly asserts that "Libya had been designated by the Executive as state sponsor of terrorism well before the bombing of Pan Am Flight 103, and before

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[4] S. Rep. No. 104-179, 104th Cong., 2d Sess. (1995); H. Conf. R. No. 104, 518, 104th Cong., 2d Sess. (1996).

the enactment of Section 1605(a)(7)". (U.S. Br. at 8). The Government's brief, however, does not identify the requisite designation by the Secretary of State under the Export Administration Act and the Foreign Assistance Act. Both Acts also require that "each determination of the Secretary of State . . . in effect on December 12, 1989, *shall be published* in the Federal Register." Had such a publication been made, the Government would most assuredly have brought it to the attention of the Court. The Government's "*post hoc* rationalizations are no substitute for adequate action by the agency itself." *Motor Vehicle Mfrs. Ass'n of Unites States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Consequently, the district court lacked statutory subject-matter jurisdiction because of the Executive's noncompliance with the jurisdictional precondition expressed in §1605(a)(7).

II.

A. Respondents and the Government contend next that in determining whether a foreign state enjoys immunity from suit the Executive exercises its own powers, not powers delegated to it by Congress. (Resp. Br. at 7, U.S. Br. at 11). They support their conclusion with the familiar principle that in the conduct of the nation's foreign relations the Executive possesses plenary powers (*id.* at 8-9) and they then point to the State Department's pre-FSIA suggestions of immunity practice which, they claim, *divested* the courts of subject-matter jurisdiction. Based on this premise respondents claim that the 1996 Amendment merely "restores to the Executive a small fraction of its [pre-FSIA] power" to make determinations regarding sovereign immunity (*id.* at 10). The Government claims that petitioners' constitutional claim is misconceived given the manner in which issues of foreign sovereign immunity were resolved before the FSIA was enacted in 1976. (U.S. Br. at 13-14).

Respondents and the Government are demonstrably wrong. A pre-FSIA suggestion of immunity had the effect of requiring the courts to *relinquish* jurisdiction previously obtained under an established jurisdictional statute (commonly admiralty or diversity jurisdiction). *See Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943) (jurisdiction based on *in rem* seizure of vessel); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964) (jurisdiction based on diversity of citizenship), *cert. denied*, 381 U.S. 934 (1965). It was never the province of a suggestion of immunity to vest or establish subject-matter jurisdiction in a court.

With the passage of the FSIA in 1976, Congress abolished *in rem* action and diversity jurisdiction against foreign states. 28 U.S.C. 1332(a)(4). See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989)(explaining changes in diversity jurisdiction). In lieu of the earlier jurisdictional bases, the FSIA established a *comprehensive jurisdictional regime* governing all aspects of suits against foreign states. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Nothing in the Court's review of the historical antecedents of the FSIA suggests that prior to the FSIA an Executive suggestion of immunity established or divested *subject-matter jurisdiction* of federal courts. See *Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981)("No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction'.")

Hence to the extent that the 1996 Amendment purports to empower the Executive to establish the subject-matter jurisdiction of federal courts with respect to designated foreign, the Act is unconstitutional.

B. Respondents and the Government contend that Congress' decision to make the jurisdiction of the federal courts a function of sovereign immunity cannot deprive the

Executive of its Constitutional power to make foreign policy decisions, including decisions that have sovereign immunity implications (Resp. Br. at 14). Respondents conclude that "in making sovereign immunity determinations, the Executive exercises its own powers, not those of Congress." (See also U.S. Br. at 10-11).

None of the principles and cases on which the respondents and Government rely support the thesis that the Executive may establish subject-matter jurisdiction in federal courts in suits against foreign sovereigns. Until the passage of the 1996 Amendment, Congress never passed an act ostensibly governing access by private parties to federal courts in suits against foreign states, and leaving it to the Executive Department to designate which particular state can be subjected to suit. This Court has emphasized that it is a "settled proposition that the subject-matter jurisdiction of the lower federal courts is determined *by Congress* 'in the exact degrees and character which *to Congress* may seem proper for the public good'." *Argentine Republic*, 488 U.S., at 433 (citing *Cary v. Curtis*, 3 How. 236, 245 (1845), emphasis added). Establishment of subject-matter jurisdiction of federal courts cannot be delegated by Congress, as here, to further foreign policy objectives of the Executive.

Petitioners do not dispute the Executive's constitutional authority and his preeminent role in international affairs; his "power to speak on listen as a representative of the nation", his authority to recognize or derecognize foreign states, his authority to receive ambassadors, or his sole competence to determine whom the United States recognizes as the official head of a foreign nation (U.S. Br. at 12-13). None of these constitutional functions and duties, however, confer any Art. I competence to determine the jurisdiction of lower federal courts.

Jones v. Unites States, 137 U.S. 202 (1890), which the court of appeals found dispositive and the Government places heavy reliance here (U.S. Br. at 11-12) does not hold that the Executive may establish the jurisdiction of federal courts. In *Jones*, Congress passed a statute authorizing the President to determine whether certain guano islands in the Caribbean "appertained to the United States." In addition, Congress provided that offenses committed on a designated guano island would be prosecuted as if committed aboard an American vessel on the high seas. Jones who had been convicted for murder on one of the islands, challenged the President's designation of the Island as "appertaining to the United States". The Court dismissed the challenge holding that the Executive's determination who is *de jure* or *de facto* rule of a territory is conclusive on the courts. 137 U.S. at 224.

Unlike here, the President's designation of the guano island as United States territory did not vest subject-matter jurisdiction of the district court. The court's jurisdiction was based on Congress' extension of an existing criminal statute. Here the competence of the district court depends on an *ad hoc* political designation by the Executive of a target state; as shown without such designation, the court may not hear the suit under §1605(a)(7)— it plainly lacks subject-matter jurisdiction.[5]

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[5] The Government also contends (U.S. Br. at 10 n.4) that "because Section 1605(a)(7) addresses only the question of foreign states susceptibility to suit, rather than establishing substantive or procedural rules of adjudicating those suits that are found to be cognizable, it cannot have the effect of 'depriving Libya of a fair trial on the merits'."

Our petition did not raise the fairness of the procedures to be used in adjudicating suits under the 1996 Amendment, since that issue is not jurisdictional. However, because the Government chose to go into the issue of fairness, we respectfully call the Court's attention to the extensive and oppressive procedural changes that the 1996 Amendment would impose on the courts in a trial on the merits; see § 1605(g) (severe

III.

Our petition urges that the court of appeals erred in refusing to address the issue of the district court's personal jurisdiction over Libya on this collateral appeal. (Pet. 18-21). Respondents insist that the court of appeals correctly followed the guidelines in *Swint v. Chambers County Com'n*, 514 U.S. 35 (1995)(Resp. Br. At 18).

Swint, however, is readily distinguishable. The Court there disapproved of the use of pendent appellate jurisdiction over a nonappealable issue involving parties different from those involved in the appealable issue. The Court explicitly refrained from "definitively or preemptively" rejecting the use of pendent appellate jurisdiction over related claims. It held that such jurisdiction may be appropriate when a nonappealable decision is "inextricably intertwined" with an appealable decision or when "review of the former decision [is] necessary to ensure meaningful review of the latter." 514 U.S., at 51-52.

As *Verlinden* teaches, 461 U.S., at 485 n.5, the unique design of the FSIA is such that service of process, personal jurisdiction and subject-matter jurisdiction are fully interrelated: if service of process does not comply with the methods of service provided in the Act, the district court will not only lack personal jurisdiction but also competence to adjudicate the case. If valid service is made, but the exercise of personal jurisdiction would offend due process[6], the court

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limitations on discovery, stay of discovery up to ten years, evaluation of evidence, and bar on motions to dismiss or for summary judgment).

[6] See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 13 (1976). "Section 1330(b) provides in effect, a federal long-arm statute over foreign states, . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision." Citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

will also lack subject matter jurisdiction to hear the case. In consequence in suits against foreign states under the FSIA subject-matter jurisdiction, personal jurisdiction and service of process are closely linked and satisfy both the "inextricably intertwined" and "necessary to insure meaningful review" test of *Swint*.

Both subject-matter and personal jurisdiction present pure questions of law. If, contrary to the FSIA's design, the issue of personal jurisdiction is viewed as being wholly divorced from the court's competence, the purpose of sovereign immunity from suit — not to subject a foreign state to a protracted trial on the merits without an initial review of jurisdiction — will render the immunity doctrine illusory. The court of appeal's view that personal jurisdiction "can be reviewed effectively on appeal from final judgment" (App. Pet. at 16a) misconceives the purpose of a collateral appeals in suits against foreign sovereign states.

IV.

Respondents urge that the Court not review the trial court's ruling that it has subject matter jurisdiction to hear the alien plaintiffs' claims *against Libya* under the Alien Tort Claims Act (28 U.S.C. §1350) under the court's supplemental jurisdiction. They say that because petitioners are subject to suit by U.S. nationals under §1605(a)(7), "they will bear no greater burden by defending claims by foreign nationals that arise out of the very same facts" (Resp. Br. at 21). They postulate that "whether Petitioners are found to be immune from suit under the Alien Tort Claims Act now, or later, is of no moment." (*Ibid*). These contentions are specious. There are scores of alien plaintiffs in this case who do not qualify to

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The report concluded that "Section 1330(b), 1608 [service] a3nd 1605-1607 [exception to immunity] are all *carefully interconnected*." (Emphasis added).

bring suit under §1605(a)(7) and any potential trial on the merits would be vastly complicated by their presence.

More importantly, the district court's jurisdictional ruling wholly disregards the 1996 Amendment's express exclusion of aliens from bringing suit; see §1605(a)(7)(B)(ii). The court's ruling squarely conflicts with the *Amarada Hess* Court's decision that the Alien Claims Tort Act cannot serve as a jurisdictional predicate for suits against foreign states. 488 U.S., at 438.

Dispositively here, §1604 of the FSIA expressly provides that "a foreign state *shall be immune* from the jurisdiction of the courts of the United States and of the States *except as provided in sections 1605 and 1607 of this chapter*." (28 U.S.C. §1604; emphasis added). It is thus plain that a federal court cannot assert jurisdiction, supplemental or otherwise, over a claim against a foreign state in the absence of jurisdiction under the FSIA. *Amerada Hess*, 488 U.S., at 439 ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court.").

The district court's ruling that it is competent to hear the aliens' claims against Libya under supplemental jurisdiction is demonstrably erroneous and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the Court should grant the writ of certiorari.

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